

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG**

MITCHELL PERKINS,

Petitioner,

v.

**CIVIL ACTION NO.: 3:18-CV-140
(GROH)**

F. ENTZEL, Warden,

Respondent.

ORDER ADOPTING REPORT AND RECOMMENDATION

Pending before the Court is the Report and Recommendation ("R&R") of United States Magistrate Judge Robert W. Trumble. Pursuant to this Court's Local Rules, this action was referred to Magistrate Judge Trumble for submission of a proposed R&R. Magistrate Judge Trumble issued his R&R [ECF No. 10] on October 18, 2018. Therein, Magistrate Judge Trumble recommends that the Petitioner's § 2241 petition [ECF No. 1] be dismissed without prejudice.

Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court is required to make a *de novo* review of those portions of the magistrate judge's findings to which objection is made. However, the Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the findings or recommendation to which no objections are addressed. Thomas v. Arn, 474 U.S. 140, 150 (1985). Failure to file timely objections constitutes a waiver of *de novo* review and of a Petitioner's right to appeal this Court's Order. 28 U.S.C. § 636(b)(1); Snyder v.

Ridenour, 889 F.2d 1363, 1366 (4th Cir. 1989); United States v. Schronce, 727 F.2d 91, 94 (4th Cir. 1984).

Objections to Magistrate Judge Trumble's R&R were due within fourteen plus three days of the Petitioner being served with a copy of the same. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The R&R was mailed to the Petitioner by certified mail on October 18, 2018. ECF No. 10. The Petitioner accepted service on October 22, 2018. ECF No. 11. The Petitioner filed objections on November 5, 2018. ECF No. 12. Accordingly, this Court will review the portions of the R&R to which the Petitioner objects *de novo*.

In his R&R, Magistrate Judge Trumble recommends that the § 2241 petition be dismissed without prejudice because the Petitioner has an outstanding post-conviction appeal in the United States Court of Appeals for the Sixth Circuit. ECF No. 10 at 6. In his objections, the Petitioner does not deny that he has an outstanding appeal. Rather, he requests that the Court stay the instant proceeding until the Sixth Circuit has resolved his appeal. ECF No. 12 at 1. A decision to stay the proceeding is within the direction of this Court. See Rhines v. Weber, 544 U.S. 269 (2005), Landis v. North American Co., 299 U.S. 248 (1936), Clinton v. Jones, 520 U.S. 681 (1997). In this case, the Petitioner's conviction is more properly appealed under a § 2255 proceeding. The Petitioner has sought relief under § 2255 in the Sixth Circuit Court of Appeals. Accordingly, the Court declines to stay the case.

Therefore, upon careful review, the Petitioner's objections are **OVERRULED** and Magistrate Judge Trumble's Report and Recommendation [ECF No. 10] is **ORDERED ADOPTED**. The Petitioner's § 2241 Petition [ECF No. 1] is **DISMISSED WITHOUT PREJUDICE**.

The Clerk is **DIRECTED** to strike this matter from the Court's active docket. The Clerk is further **DIRECTED** to transmit copies of this Order to all counsel of record herein and to mail a copy of this Order to the *pro se* Petitioner by certified mail, return receipt requested.

DATED: November 7, 2018



GINA M. GROH
CHIEF UNITED STATES DISTRICT JUDGE